In this class, we think, also, the fact that the provision was intended by the husband as in the nature of a jointure, may be shown by parol. The statute does not say, as in case of a will, and of a jointure with consent at the time, that it must appear by the writing.

It has been held that in contracts within the statute of frauds, consideration may be shown by parol. *Gregory* vs. *Logan*, 7 Blackf. 112. See *Rockhill* vs. *Spraggs*, 9 Ind. 30. So, as to whether a given conveyance was intended to be by way of advancement. *Shaw* vs. *Kent*, 11 Ind. 80.

The case at bar falls within the class under consideration.

On the last point, viz: whether the widow, in case she establishes her right to a portion of the inheritance of which Allen died seized, must contribute to payment of incumbrances, no decision will now be made, as the question does not necessarily arise in the partition suit. We may observe, that at common law, she would have been bound to contribute to discharge the liens. *Whitehead* vs. *Cummins*, 2 Ind. 58. Whether our statute has made a change, is the question. The demurrer to the second paragraph of the answer of the defendants is overruled on the defendant's striking out the words *pro-tanto* therein, and so is that to the second paragraph of the answer of William and Kate Allen; and those to the others are sustained.

Schermehorn, Huff, and Jones, for plaintiffs.
Pratt and Baldwin, for defendants.

In the Supreme Court of Michigan.—July Term, 1861.

ALPHEUS G. SMITH AND OTHERS *vs.* ISAAC C. KENDALL.[1]

An instrument by which the makers promise to pay, to the order of the payees, at a time and place named, a specific sum of money, *with current exchange on New York*, is a negotiable promissory note.—CAMPBELL, J., *dissenting*.

Error to Kent Circuit. The principal question in the case was, whether Kendall, the plaintiff (below), as endorsee of the following instrument, was entitled to treat it as a promissory note, and bring suit thereon in his own name:

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[1] We are indebted to T. M. Cerley, Esq., the learned State Reporter, for the sheets of this case.—EDS. AM. L. REG.

"$793 98. NEW YORK, July 13, 1858.

Eight months after date we, the subscribers, of Grand Rapids, County of Kent, and State of Michigan, promise to pay to the order of Eli Bowen and McConnell, seven hundred and ninety-three dollars and ninety-eight cents, at the banking house of Duncan, Sherman & Co. Value received, with current exchange on New York. SMITH & McCONNELL.

J. T. Holmes, for plaintiffs in error.

Withey and *Gray*, for defendant in error.

The opinion of the Court was delivered by

MANNING, J. The instrument, it is argued, is not a promissory note, because it is payable with current exchange on New York. It is for $793 98 if paid in the city of New York; if paid elsewhere, it calls for that amount, with such additional sum, called exchange, as will make the amount where paid equivalent to $793 98 in the city of New York.

A promissory note must be for the payment of a certain sum of money. Exchange varies from time to time, and might have been more or less when the $793 98 were to be paid than when the instrument was given. Is this fluctuation, to which exchange is subject, such a contingency or uncertainty as the rule requiring a note to be for a sum certain was intended to guard against? We think not. Bills of exchange and promissory notes are commercial instruments, and to facilitate commerce, are subject to certain rules of law not applicable to other contracts. These rules should be liberally construed, and in such a way as to effect the object had in view. Exchange is an incident to bills for the transmission of money from one place to another. Its nature and effect are well understood in the commercial world; and merchants having occasion to use their funds at their place of business, sometimes make their currency at that point the standard of payments made to them by their customers at a different point. Such is the design of the instrument before us; and we believe that such instruments are considered by commercial men to be promissory notes. In *Pollard* vs. *Herries*, 3 Bos. & Pul., 335, P deposited a certain sum of money with H, in Paris, and took H's note, "payable in Paris, or, at the choice of the bearer, at the Union Bank, in Dover, or at H's usual residence in London, according to the course of exchange upon Paris." This

instrument was declared on as a promissory note, and spoken of and treated by both counsel and court as a promissory note. It is called a promissory note by the Reporter, and treated as such by M. Chitty in his Treatise on Bills of Exchange, pp. 232, 424. In *Leggett* vs. *Jones*, 10 Wis. 34, a written promise to pay a sum of money "with exchange on New York" was held to be a promissory note.

The judgment cannot be affirmed.

MARTIN, Ch. J., concurred.

CHRISTIANCY, J.—I concur in the opinion of my brother Manning. So far as relates to the question of exchange, I think this note should be considered as resting upon substantially the same principle as if made payable in New York without exchange.

CAMPBELL, J. dissenting: I do not think that a negotiable promissory note can be made except for a sum certain. This is an old and familiar doctrine, which is laid down by the best authorities without qualification. And while it is undoubtedly true that railroad bonds and some other securities of like character, made by corporations, have been negotiable, yet there is no real difference between these and ordinary negotiable paper, except in their being under a corporation seal, which is merely the most appropriate evidence of corporate action. The requisites of certainty, both as to time and mode of payment, have always been regarded as substantial, and as the most essential elements of paper made for circulation and payable to the holder. And although a *quasi* negotiability has been asserted of bills of lading, and some documents of like character, yet complete negotiability has never been extended beyond such paper as has, since the Statute of Anne, possessed that quality by commercial law. And it does not seem to be in harmony with any principle of law to break down the settled rules which have given value and currency to such securities. If negotiability only meant the liability to be sued in the name of a bearer or endorsee, it would be of little consequence. But when paper is made negotiable, it passes from one to another, discharged from all equities until its maturity. The parties who make, or accept, or

endorse it, become subject to peculiar liabilities. And I do not think anything short of a clear legislative authority should be permitted to affix such burdens or privileges to any new class of contracts.

In the case of *Pollard* vs. *Herries*, 3 Bos. & Pul. 335, the action being between the immediate parties to the note, no question arose concerning its negotiable character; and there is no English case, that I am aware of, which has given any countenance to innovation on this subject. So far as any practice has existed in this State, in relation to notes payable with exchange, I believe it has not been in favor of their negotiability. The question has been raised several times in the Federal Court within my own experience, and every case I have known has held them not to possess that character. And I doubt exceedingly whether the general opinion of commercial men is by any means settled in their favor.

There is no reason why one kind of uncertainty should be more favored than another. It is very well settled by most courts that a note payable in current bank bills is not negotiable. And yet the principle objections to allowing bank bills for this purpose apply to exchange. They both fluctuate in value, under very similar conditions. The difference of exchange between the two places has no direct connection with the expense of transporting money. It is as cheap to take money from New York to London, as from London to New York, and yet there is a difference of about ten per cent. in favor of London almost always. There are, however, no means of calculating the rate in advance, and fluctuations of several per cent. occur within a few weeks. Nor can the promise, contained in the note before us, be regarded as equivalent to an agreement to pay what will make a uniform sum in New York. This can only be on the assumption that the balance of exchange will always be one way, whereas it is very well known that there is no such certainty. And this note would not be satisfied by a payment of less than the sum mentioned in it, although it might be worth much more than the same amount in New York. It is very true that New York is likely to have a balance against us; but the principle adopted, if true at all, must apply to all places.

It may be that public convenience would be subserved by changing the existing rules. But to hold this paper negotiable, would, I think, be not an application of a common law principle to a new subject, but the abrogation of a principle entirely. This would come more appropriately from another department of the government. I regret that I have not been able to satisfy myself with the conclusion of the court upon this question, which is certainly one of general interest.